Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

86-2061

NO. _____

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

CITIZENS FOR BETTER EDUCATION,
A TEXAS NON-PROFIT CORPORATION, et al.,
*Appellants*

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT
SCHOOL DISTRICT AND THE BOARD OF
TRUSTEES OF GOOSE CREEK CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT,
*Appellees*

**ON APPEAL FROM THE
SUPREME COURT OF TEXAS**

## JURISDICTIONAL STATEMENT

GEORGE M. KIRK, JR.
3223 Smith, Suite 224
Houston, Texas 77006
713/522-9544

*Attorney for Appellants*

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

## QUESTIONS PRESENTED

1. Did the Supreme Court of Texas err in upholding a legislative enactment which provides for remedial desegregation of a school district without a finding of prior *de jure* or *de facto* discrimination?

2. Did the Supreme Court of Texas err in approving a rational basis standard of review in a challenge to a desegregation plan motivated by racial and ethnic considerations?

II

## PARTIES

The parties to this proceeding are:

1. Appellants:

   Citizens for Better Education, a Texas Non-Profit Corporation; Edwin & Annie Gonzalez, Individually and as Next Friend of Sandy Gonzalez; Dan & Vicki Pinson; Richard & Diana Dietrich; Mirta Benavides, Individually and as Next Friend of Chris Benavides; Mary Buie; Carolyn Chase, Individually and as Next Friend of Ed & Wallace Chase; Rena Chaney, Mike & Linda Shirley; Tom Oliver; Jim & Bonnie Hardy; Carolyn Hinchliffe; Madalyn Albus, Individually and as Next Friend of Matthew Albus; Judy Gallender, Individually and as Next Friend of Melissa Gallender; Bridget Gerza; Mary Hutchinson; Georgia Ruth Vosloh; and Jeannine Johnson.

2. Appellees and Intervenors:

   Goose Creek Consolidated Independent School District, the Board of Trustees of the Goose Creek Consolidated Independent School District, Pamela K. Sutton, James M. Cauley, Robert J. Kalbitz, William Keith Lawhon and wife, Donna M. Lawhon, Rolland J. Pruett and wife, Joan K. Pruett, William L. Hinkle, Robert R. Buntin, Kenneth L. Tilton and wife, Gayle Tilton, Jimmy Epperson, Bobby Thompson and wife, Gwendolyn Thompson and Percy Wilburn Vail and wife, Margaret Ann Vail.

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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

CITIZENS FOR BETTER EDUCATION,
A TEXAS NON-PROFIT CORPORATION, et al.,
*Appellants*

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT
SCHOOL DISTRICT AND THE BOARD OF
TRUSTEES OF GOOSE CREEK CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT,
*Appellees*

**ON APPEAL FROM THE
SUPREME COURT OF TEXAS**

## JURISDICTIONAL STATEMENT

The Appellants respectfully pray that the Court sustain jurisdiction on appeal and reverse the decision of the Texas Supreme Court entered on March 25, 1987.

## OPINIONS BELOW

The opinion of the Supreme Court of Texas entered March 25, 1987 refusing discretionary review and the opinion of the Court of Appeals for the First Supreme Judicial District of Texas entered August 28, 1986 are set out in the Appendix hereto, pages 1a and 7a, respectively. The order of the Court of Appeals denying rehearing appears in the Appendix, page 3a. The judgment and memorandum opinion of the 125th Judicial District Court of Harris County, Texas are set out in the Appendix hereto, pages 16a and 27a, respectively. The opinion of the Court of Appeals for the First Supreme Judicial District of Texas is reported at 719 S.W.2d 350. No other opinion in this case has been reported.

## JURISDICTION

This action draws into question the validity of a voluntary desegregation plan enacted by the Board of Trustees of the Goose Creek Consolidated Independent School District under the equal protection clause of the fourteenth amendment. The primary focus of this desegregation plan is an attempt to equalize the number of Hispanic students attending the two high schools in the Goose Creek Consolidated Independent School District. It was stipulated by the parties that there has been no *de jure* or *de facto* segregation, either presently or historically, with regard to Hispanics in the Goose Creek school district. The desegregation plan is also characterized as a remedy for perceived ethnic imbalance brought about solely by demographic change in the community.

The federal constitutional question was timely raised before the trial court as is indicated by the order of the

125th Judicial District Court of Harris County, Texas signed on August 8, 1985 which appears in the Appendix at page 26a. Following the reception of evidence on the plaintiffs' application for a temporary injunction, on August 1, 1985, the trial court ruled that the desegregation plan enacted by the Goose Creek Consolidated Independent School District was within the constitutional authority of the school board in furtherance of its obligation to maintain a desegregated school system. The trial court denied the plaintiffs' request for a temporary injunction in its Memorandum of Opinion which appears in the Appendix at page 27a. This case was preferentially set for trial on the merits, and on August 9, 1985, the trial court entered a final judgment which appears in the Appendix at page 16a. In support of this judgment, the trial court entered findings of fact and conclusions of law on September 16, 1985. The trial court's findings are contained in the Appendix at page 21a.

The Court of Appeals for the First Supreme Judicial District of Texas affirmed the decision of the trial court on August 28, 1986. A timely motion for rehearing filed by the Appellants was overruled by the Court of Appeals for the First Supreme Judicial District of Texas on November 13, 1986.

Appellants sought review of the decision of the Court of Appeals by filing an Application for discretionary Writ of Error with the Supreme Court of Texas. On March 25, 1987, the Supreme Court of Texas refused the Appellants' Application for Writ of Error and noted that there was no reversible error in the opinion of the Court of Appeals for the First Supreme Judicial District of Texas. Notice of Appeal to this Court was timely filed with the Supreme Court of Texas on June 23, 1987 and the Court

of Appeals for the First Supreme Judicial District of Texas on June 22, 1987. Appellants' Notice of Appeal is contained in the Appendix at page 45a.

The jurisdiction of the United States Supreme Court to review this decision of the Supreme Court of Texas on appeal is confirmed by 28 U.S.C. § 1257(2).

## CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment XIV appears in the Appendix at page 44a.

## STATEMENT OF THE CASE

The Appellants, Citizens for Better Education, a Texas non-profit corporation, and certain named individuals, parents of some of the students in the Goose Creek Consolidated Independent School District, brought suit to prevent the implementation of what was characterized as a remedial desegregation plan. In the absence of *de jure* or *de facto* segregation, the Appellants urged that the freedom from disruption attendant to the implementation of such a plan, is guaranteed by the fourteenth amendment to the U. S. Constitution. Appellants also sought declaratory relief under the state and federal constitutions, claiming the action of the Board of Trustees was based upon improper racial considerations. At the temporary injunction hearing, Appellants asserted that based on state and federal law, the school district had no power or authority to implement a plan of desegregation, included as part of such plan the involuntary transportation of students, where there had been neither a complaint of

*de facto* segregation nor an administrative or judicial finding of at least *de facto* segregation. The district court characterized the issue as follows:

> "Does a local school board have the power, after a unitary system has been achieved, to voluntarily initiate and implement a plan of integration based on the race or ethnic origin of the students to be affected, in order to correct a racial imbalence brought about solely by demographic change?"

On final hearing, the trial court determined that the rezoning plan adopted by the Board of Trustees was within the federal and state constitutional authority of the board and denied Appellants' request for a permanent injunction to enjoin the implementation of the plan.

The Appellants sought review of the trial court's denial of relief in the Court of Appeals for the First Supreme Judicial District of Texas. The Court of Appeals affirmed the judgment of the trial court, finding that the Board of Trustees had power to do what a court had no power to do without a finding of segregation. The appeals court, while recognizing that race was generally considered to be a suspect classification, held that in this case, it was subject only to a rational basis analysis because race was used to extend benefits rather than to deny benefits. Following the denial of a timely Motion for Rehearing, the Appellants sought discretionary review by Application for Writ of Error to the Texas Supreme Court which was filed on December 15, 1986, and refused by the Texas Supreme Court on March 25, 1987.

## THE FEDERAL QUESTION IS SUBSTANTIAL

### I. State legislation enacted as a remedy for discrimination without a finding of past or present segregation violates the equal protection clause of the fourteenth amendment.

The Supreme Court of Texas, by finding no reversible error in the decision of the Court of Appeals for the First Supreme Judicial District of Texas that a school board has the authority to enact a race-conscious desegregation plan in the absence of prior *de jure* or *de facto* segregation, has wholly misconstrued the prior decisions of this Court interpreting the equal protection clause of the fourteenth amendment.

The statistical realignment of the percentage of students attending the two high schools in Goose Creek Consolidated Independent School District was motivated primarily upon racial and ethnic considerations. The perceived ethnic imbalance occurred, however, because of demographic change and not due to *de jure* or *de facto* segregation. The trial court found that Appellees were within their constitutionally mandated authority ". . . in furtherance of its constitutional obligation to maintain a desegregated school system." The Court of Appeals concurred, holding that ". . . the trustees had authority to do, as a matter of educational policy, what a court had no power to do in the absence of a finding of segregation."

This holding is directly contrary to this Court's decision in *Wygant v. Jackson Bd. of Educ.*, ____U.S.____, 106 S. Ct. 1842 (1986).

In *Wygant,* the Court held that in the absence of a finding of prior discrimination, a classification predicated upon racial considerations is not justified or supportable.

In judging the propriety of any desegregation plan, two competing interests of constitutional magnitude are at stake. In the first instance, the right of individuals to receive public education free of racial segregation and discrimination is guaranteed by the fourteenth amendment to the U.S. Constitution. *Brown v. Bd. of Educ.,* 349 U.S. 294, 75 S. Ct. 753 (1955). On the other hand, individuals retain the right to be free from unnecessary and burdensome intrusions into their personal lives imposed by government through racial classifications in the absence of a compelling reason which benefits society as a whole.

In this case, the court below has held that a local school board by legislative act may implement a voluntary desegregation plan based on the broad discretionary power of a school board to formulate and implement educational policy. It is the Appellants' position however, that in the specific area of the racial or ethnic make-up of a local school system, the discretionary power of a board of trustees is limited in the absence of a compelling reason to remedy the effects of discrimination.

Governmental classifications based on race or ethnicity are inherently suspect. *Regents of Univ. of California v. Bakke,* 438 U.S. 265, 98 S. Ct. 2733 (1978). As such, courts view such classifications with the most exacting scrutiny. *Id.,* at 2748.

It is the Appellants' position that prior to the implementation of a desegregation plan, whether voluntary or

involuntary, by judicial order or otherwise, a threshold determination must be made that discrimination, either *de jure* or *de facto,* has existed. Without a finding of prior discrimination, there is no basis for a remedy. Simply stated, there must be a wrong, before there can be a remedy.

In this case, it was stipulated by the parties, and specifically found by the trial court, that the Goose Creek Consolidated Independent School District is a unitary school district and legally devoid of discrimination. As a matter of law, the court below erred in upholding Appellees' actions in enacting a voluntary desegregation plan without a prior finding of discrimination upon which to justify the denial of Appellants' constitutional rights. *Wygant,* supra at 1848.

## II. The court below erred in applying a rational basis standard of review to Appellants' claims under the equal protection clause of the fourteenth amendment.

The court below has held that the appropriate standard of review of Appellants' claims under the equal protection clause is a rational basis analysis. This standard is deemed appropriate by the court since education is not considered a fundamental right guaranteed by the Constitution of the United States. While the court below may be correct as to the constitutional protection afforded education, the court fails to recognize that any classification made on the basis of race or ethnicity is inherently suspect. *Fullilove v. Klutznick,* 448 U.S. 448, 100 S. Ct. 2758 (1980). It is undisputed, and specifically found by the trial court, that the primary motivation for Board of

Trustees' enactment of the desegregation plan was race and ethnicity. Given the nature of this classification, the court below clearly erred in its holding that Appellants' claim under the equal protection clause is subject to "rational basis" rather than "strict scrutiny" analysis. *Wygant,* supra at 1846.

Although disavowing strict scrutiny analysis, the Court of Appeals opined that providing an integrated education furthers a compelling state interest. While this conclusion may be correct in a broad sense, in the case before this Court, the need to integrate the Goose Creek Consolidated Independent School District is absent. The reliance of the court below upon the *Swann* cases for upholding the propriety of the desegregation plan is misplaced since these cases deal with remedying the effects of past discrimination. *Swann v. Charlotte-Mecklenburg,* 402 U.S. 1, 91 S. Ct. 1267 (1971); *N. Carolina State Bd. of Educ. v. Swann,* 402 U.S. 43, 91 S. Ct. 1248 (1971).

Clearly, the Supreme Court of Texas was mistaken in not finding error in the application of the rational basis test to Appellants' claim of denial of equal protection under the fourteenth amendment to the United States Constitution.

## CONCLUSION

The decision below upholding the propriety of the desegregation plan enacted by the Appellees should be summarily reversed and sent back to the Supreme Court of Texas for decision in conformity with this Court's holding in *Wygant,* supra. Alternatively, this appeal should be accorded plenary review or by Writ of Certiorari to the Supreme Court of Texas, as appropriate.

DATED: June 23, 1987.

Respectfully submitted,

GEORGE M. KIRK, JR.
3223 Smith, Suite 224
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713/522-9544

*Attorney for Appellants*

## APPENDIX A

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

March 25, 1987

Mr. George M. Kirk, Jr.
Strahan & Kirk, Inc.
3223 Smith, Suite 224
Houston, TX 77006

Mr. Richard A. Peebles
Reid, Strickland & Gillette
P. O. Box 809
Baytown, TX 77522

Mr. Kelly Frels
Bracewell & Patterson
2900 South Tower Pennzoil Place
Houston, TX 77002

RE: Case No. C-6032

STYLE: CITIZENS FOR BETTER EDUCATION ET AL v. GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT ET AL.

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respondent's motion to withdraw motion to amend reply to petitioner's application and motion to dismiss for want of jurisdiction is granted.

Respectfully yours,

Mary M. Wakefield, Clerk

By: /s/ BLANCA E. MORIN
Deputy

cc:

Mr. Andrew Lannie
3814 Hwy 146
Houston, TX 77520

## APPENDIX B

COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT

ORDER

APPELLATE CAUSE NO. 01-85-00837-CV

CITIZENS FOR BETTER EDUCATION, A TEXAS NON-PROFIT CORPORATION, ET AL, Appellant

v.

GOOSE CREEK CONSOLIDATE INDEPENDENT SCHOOL DISTRICT ET AL, Appellee

On this 13th day of November 1986 came on to be considered Appellants' Motion for Rehearing

AND SUCH MOTION IS HEREBY OVERRULED

PER CURIAM

Panel consisting of Justices Bass, Cohen and Dunn.

A true copy attest:

KATHRYN COX
FIRST COURT OF APPEALS

BY: /s/ MARGIE THOMPSON
Chief Deputy

Hon. George M. Kirk, Jr.
Attorney at Law
3223 Smith, Suite 224
Houston, TX 77006

Hon. Richard A. Peebles
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2900 South Tower Pennzoil Place
Houston, TX 77002

Hon. Andrew J. Lannie
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3814 Highway 146
Baytown, TX 77520

## APPENDIX C

COPY OF JUDGMENT

No. 01-85-0837-CV

CITIZENS FOR BETTER EDUCATION, a Texas non-profit corporation; and, EDWIN & ANNIE GONZALEZ, individually and as next friend of SANDY GONZALEZ, a minor child; DAN & VICKI PINSON; RICHARD & DIANA DIETRICH; MIRTA BENAVIDES, individually and as next friend of CHRIS BENAVIDES, a minor child; MARY BUIE; CAROLYN CHASE, individually and as next friend of ED & WALLACE CHASE, minor children; RENA CHANEY; MIKE & LINDA SHIRLEY; TOM OLIVER; JIM & BONNIE HARDY; CAROLYN HINCHLIFFE; MADALYN ALBUS, individually and as next friend of MATTHEW ALBUS, a minor child; JUDY GALLENDER, individually and as next friend of MELISSA GALLENDER; BRIDGET GERZA; MARY HUTCHINSON; GEORGIA RUTH VOSLOH; and, JEANNINE JOHNSON,
Appellants

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT; and, THE BOARD OF TRUSTEES OF THE GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
Appellees

Appeal from the 125th District Court
of Harris County, Texas.
(Trial Court No. 85-32372).
Opinion delivered by Justice Cohen,
Justices Bass and Dunn also sitting.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on August 9, 1985.

After hearing the cause on the transcript of the record and inspecting the same, it is the opinion of this Court that there was no error in the judgment.

It is therefore CONSIDERED, ADJUDGED, AND ORDERED that the judgment of the court below be in all things affirmed.

It is further ORDERED that the appellants, CITIZENS FOR BETTER EDUCATION, a Texas non-profit corporation; and, EDWIN & ANNIE GONZALEZ, individually and as next friend of SANDY GONZALEZ, a minor child; DAN & VICKI PINSON, RICHARD & DIANA DIETRICH; MIRTA BENAVIDES, individually and as next friend of CHRIS BENAVIDES, a minor child; MARY BUIE; CAROLYN CHASE, individually and as next friend of ED & WALLACE CHASE, minor children; RENA CHANEY; MIKE & LINDA SHIRLEY; TOM OLIVER; JIM & BONNIE HARDY; CAROLYN HINCHLIFFE; MADALYN ALBUS, individually and as next friend of MATTHEW ALBUS, a minor child; JUDY GALLENDER; individually and as next friend of MELISSA GALLENDER; BRIDGET GERZA; MARY HUTCHINSON; GEORGIA RUTH VOSLOH; and, JEANNINE JOHNSON, and their surety, FIDELITY AND DEPOSIT COMPANY, jointly and severally, pay all costs incurred by reason of this appeal.

It is further ORDERED that this decision be certified below for observance.

## APPENDIX D

COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT

OPINION

NO. 01-85-0837-CV

CITIZENS FOR BETTER EDUCATION, ET AL.,
Appellants

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellees

---

On appeal from the 125th District Court of
Harris County, Texas
Trial Court Cause No. 85-32372

---

The appellants seek review of the trial court's denial of permanent injunctive relief in their suit to invalidate a rezoning plan adopted by the Board of Trustees of the Goose Creek Consolidate Independent School District ("the trustees"). The appellants are a group of parents who reside in the school district.

Goose Creek Consolidated Independent School District contains two high schools, Robert E. Lee and Ross S. Sterling, which in past years had been similar in size, socioeconomic makeup, test scores, and ethnic balance. The trial court found that in recent years, demographic

patterns were changing the ethnic composition of the two high schools, and that the trustees studied possible alternatives for preventing ethnic and socioeconomic isolation between the schools. Two public hearings were held on the issue. The trustees eventually adopted a rezoning plan that changed the attendance zones for Lee and Sterling, shifting some boundaries to the north. The plan also moved the bilingual education program from Lee to Sterling. Other than bilingual students, only students *entering* high school after the 1984-85 school year are affected by the plan, which also includes a sibling exception. Consequently, no students presently attending either school are required to change schools.

The record reflects that Lee and Sterling High Schools are 3.6 miles apart, a distance that can be traveled by car in 10 minutes. It shows that while some students will have to be bussed to school solely due to boundary changes, most of those who will be bussed would have ridden a bus to school anyway.

The appellants charge that the rezoning plan was an illegal white/Anglo effort to change "a perceived ethnic imbalance" between the two high schools in the district. The parties agree that there is no issue of *de jure* segregation within the school district, but the appellees argue that it was concern over future *de facto* segregation that motivated the board's efforts to more evenly distribute the ethnic compositions of Lee and Sterling High Schools.

In eight points of error, the appellants claim that the lower court erred in refusing the requested injunction, because (1) the trustees had no power to voluntarily implement a student assignment plan based on race to remedy an imbalance caused by demographic changes in

the district; (2) the trustees acted outside the scope of their discretionary powers in adopting the plan and acted with discriminatory purpose; (3) the rezoning plan is contrary to federal and state constitutional authority; and (4) sections 21.074 and 21.075 of the Texas Education Code require that the parents of affected students be given individual hearings to contest the "transfer" of their children to a new school.

The appellants point out that there was no legal obligation of the trustees to implement a desegregation plan, absent a finding of segregation. But the absence of a court order to desegregate does not mean that a school board cannot exceed minimum requirements in order to promote school integration. School authorities are traditionally given broad discretionary powers to formulate and implement educational policy and may properly decide to ensure to their students the value of an integrated school experience. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971); *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 45-46 (1971).

> School authorities . . . might well conclude for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

*Swann v. Charlotte-Mecklenburg,* 402 U.S. at 16. Thus, the trustees had authority to do, as a matter of educa-

tional policy what a court had no power to do in the absence of a finding of segregation.

The appellants assert that the plan violates their constitutional rights of equal protection and due process of law. Appellants attack a voluntary effort by school authorities to achieve ethnic balance. We are not concerned here with the constitutionality of distributing a limited number of privileges on the basis of race, as was the case in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). The parties acknowledge that both schools provide a quality education; that no child has been excluded from school or assigned to an inferior school; and that there is no constitutional right to attend a particular school.

A primary purpose of the equal protection clause is to prevent government conduct that discriminates on the basis of race. *See Washington v. Davis,* 426 U.S. 229, 239 (1976). Though race is generally considered a suspect classification, it was used in this case to promote integration, i.e., to extend benefits rather than to deny them, and should, therefore, only be subject to "rational basis" rather than "strict scrutiny" analysis. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). Education is not explicitly guaranteed by the Constitution and is not considered to be a fundamental right. *Id.* at 35. If strict scrutiny were to apply, however, providing an integrated education has been described as perhaps the most important function of government and satisfies the requirement that the official action further a compelling state interest. *Brown v. Board of Education,* 347 U.S. 483 (1954).

Courts have acknowledged that race may legitimately be considered in a school board's decision to further its

policy that an ethnically balanced school setting is important to education. *See Swann v. Charlotte-Mecklenburg,* 402 U.S. 1; *North Carolina State Board of Education v. Swann,* 402 U.S. 43; *McDaniel v. Barresi,* 402 U.S. 39 (1971); *Offermann v. Nitkowski,* 378 F.2d 22, 24 (2d Cir. 1967).

There has been no showing that the trustees' plan redrawing attendance zones had either a discriminatory motive or a discriminatory impact on minority students. The parties agree that both Lee and Sterling High Schools provide a good education. The plan adjusted geographic attendance zones within the school district to develop a more equal ethnic balance at the two schools, and it did not transfer only certain students according to ethnicity or race. Students are assigned to one of the high schools according to their residence in that school's attendance zone. As stated, there is no constitutional right to attend a particular school, and there has been no showing that any reclassified students are being deprived of equal educational opportunity.

Nor does the record support the appellants' contention that the plan has no rational basis. There was evidence that recent demographic changes had concentrated Hispanic residents and low-income families in the southern part of the district and that geographic limitations had otherwise caused a development shift to the north. There was evidence that these factors would affect the racial and ethnic composition of the two high schools more significantly in the future, causing an expected higher concentration of Hispanic students at Lee.

There was testimony that the trustees studied various alternatives to prevent future de facto segregation or

ethnic isolation in the schools; the rezoning plan finally adopted was the least disruptive, because it moved the fewest students, had the lowest transportation cost, and had no foreseeable adverse effect on the district's educational program. Two public hearings were held on these issues. The trial court found that though ethnic balance was the trustees' chief motive in redrawing attendance zones, they were also concerned with socioeconomic factors, achievement test scores, and course offerings. The record as a whole demonstrates that the plan adopted was substantially related to the trustees' purpose of assuring ethnic balance in district high schools, and was not, as appellants assert, "arbitrary and capricious."

The contention that constitutional due process required that the appellants be given individual hearings to contest the "transfer" of their children to another school is also without merit. The appellants have not shown an infringement of a liberty or property interest. *See Goss v. Lopez,* 419 U.S. 565 (1975). Students have no constitutional right to attend a particular school. *See McDaniel v. Barresi,* 402 U.S. 39; *Broussard v. Houston Independent School District,* 395 F.2d 817, 821 (5th Cir. 1968). The appellants have not shown a constitutionally protected interest entitling them to due process hearings. Points of error one, two, three, and seven are overruled.

Next, the appellants contend that the redrawing of attendance zones to achieve racial and ethnic balance violates state law. They emphasize in their brief that they do not contest the power of a Texas school board to periodically adjust the attendance zones of schools in order to accomodate changing population demographics,

but they do contest this action if based only on considerations of ethnicity.

The Texas Education Code vests broad power in the board of trustees of an independent school district. Section 23.26(b) of the Code provides that the trustees shall have the exclusive power to manage and govern the public free schools of the district. Tex. Educ. Code Ann. (Vernon 1972). The appellants acknowledge that the trustees have general power to set attendance zones. Courts will not interfere with school trustees in the exercise of their broad powers of control and management unless a clear abuse of power and discretion is shown. *Nichols v. Aldine Independent School District,* 356 S.W. 2d 182, 185 (Tex. Civ. App.—Houston 1962, no writ); *Kissick v. Garland Independent School District,* 330 S.W.2d 708, 710 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.).

The appellants contend specifically that sections 21.074 and 21.075 of the Texas Education Code prohibit the trustees' action. Section 21.074 permits the trustees of any school district to transfer and assign any pupil or pupils from one school or classroom to another within its jurisdiction. In also provides that such transfers not be made by a general or blanket order, but rather on an individual basis, taking into consideration the factors listed in section 21.075. Section 21.078 requires that a hearing be afforded upon receipt by the board of a petition stating objections to the assignment of a pupil to the school to which he has been assigned.

The trustees called as an expert witness Mr. Robert Howell, the supervising attorney for the Office of General Counsel, Texas Education Agency. Mr. Howell testified

that he often was required to render opinions on the agency's position on education laws and policies; that he advises school districts about their legal responsibilities; that he responds to inquiries involving school law from either school districts or the general public; and that the agency is responsible for ensuring that school districts and educational entities in Texas comply with all state and federal laws, as well as their own internal rules.

Mr. Howell testified that there is a difference between a "transfer" and a "rezoning" in the administration of public education in Texas. He stated that a rezoning involves a territorial restructuring of the school district that may or may not involve transfers of students. A "transfer," on the other hand, involves a change in attendance of one student to one facility or to a classroom, or to a different school building within a school district. Mr. Howell described rezoning as a geographical issue, transfer as a "people issue." Though a change of geographical boundaries affects the residents of the area, Howell explained that rezoning really means "taking an area and making it belong to another educational entity . . . [students] are not transferred out of one area that they belong to and have a right to attend into another which it is questionable whether or not they have a right to attend." This distinction was affirmed by another witness, Mr. W. C. Herring, a retired school administrator with experience in teaching and school administration since 1939.

Mr. Howell further stated that the Texas Education Agency heard cases concerning the rezoning of school attendance boundaries and that he could not recall that the issue of whether sections 21.074 and 21.075 applied had ever arisen. He further testified that, in his opinion,

those sections were not applicable where a school district had rezoned its boundaries. Though Howell had never encountered a zoning plan similar to the instant one, which contains "pocket" zones rather than a contiguous zone, he stated that his answer would not be different for such a plan.

We find the distinction between a "rezoning" and a "transfer" to be persuasive. We hold that the trial court correctly decided that sections 21.074 and 21.075 of the Texas Education Code do not apply to the facts of this case. Thus, section 21.078 did not entitle the appellants to separate hearings to contest the alleged transfer of individual students under the rezoning plan. Points of error four, six, and eight are overruled.

In view of our holding that sections 21.074 and 21.075 do not apply here, we do not reach point of error five, challenging the lower court's finding that those sections are unconstitutional.

The judgment of the trial court is affirmed.

/s/ MURRY B. COHEN
Murry B. Cohen

Justices Bass and Dunn also sitting.

For publication.

Judgment rendered and opinion delivered August 28, 1986.

True copy attest;

/s/ KATHRYN COX
Kathryn Cox
Clerk of the Court

## APPENDIX E

FINAL JUDGMENT, SIGNED: August 9, 1985. ENTERED: Volume 3080, Page 402, General Minutes, District Courts, in and for Harris County, Texas.

No. 85-32372

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
125th JUDICIAL DISTRICT

CITIZENS FOR BETTER EDUCATION, a Texas non-profit corporation; and, EDWIN & ANNIE GONZALEZ, individually and as next friend of SANDY GONZALEZ, a minor child; DAN & VICKI PINSON; RICHARD & DIANA DIETRICH; MIRTA BENAVIDES, individually and as next friend of CHRIS BENAVIDES, a minor child; MARY BUIE; CAROLYN CHASE, individually and as next friend of ED & WALLACE CHASE, minor children; RENA CHANEY; MIKE & LINDA SHIRLEY; TOM OLIVER; JIM & BONNIE HARDY; CAROLYN HINCHLIFFE; MADALYN ALBUS, individually and as next friend of MATTHEW ALBUS, a minor child; JUDY GALLENDER, individually and as next friend of MELISSA GALLENDER; BRIDGET GERZA; MARY HUTCHINSON; GEORGIA RUTH VOSLOH; and, JEANNINE JOHNSON,
Plaintiffs

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT; and, THE BOARD OF TRUSTEES OF THE GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
Defendants

### J U D G M E N T

BE IT REMEMBERED that on the 8th day of August, 1985, came on to be heard the above-entitled and num-

bered cause with the parties thereto making announcements as set forth herein.

CITIZENS FOR BETTER EDUCATION, a Texas non-profit corporation; and, EDWIN & ANNIE GONZALEZ, individually and as next friend of SANDY GONZALEZ, a minor child; DAN & VICKI PINSON; RICHARD & DIANA DIETRICH; MIRTA BENAVIDES, individually and as next friend of CHRIS BENAVIDES, a minor child; MARY BUIE; CAROLYN CHASE, individually and as next friend of ED & WALLACE CHASE, minor children; RENA CHANEY; MIKE & LINDA SHIRLEY; TOM OLIVER; JIM & BONNIE HARDY; CAROLYN HINCHLIFFE; MADALYN ALBUS, individually and as next friend of MATTHEW ALBUS, a minor child; JUDY GALLENDER, individually and as next friend of MELISSA GALLENDER; BRIDGET GERZA; MARY HUTCHINSON; GEORGIA RUTH VOSLOH; and, JEANNINE JOHNSON, the Plaintiffs, appeared in person and by attorney of record, GEORGE M. KIRK, JR., and announced ready for trial.

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT and THE BOARD OF TRUSTEES OF THE GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, the Defendants, appeared in person and by attorneys of record, RICHARD A. PEEBLES and TIMOTHY T. COOPER, and announced ready for trial.

INTERVENORS, appeared in person and by attorney of record, ANDREW LANNIE, and announced ready for trial.

All parties agreed that the testimony, exhibits and evidence presented and received by the Court at the

temporary injunction hearing held on July 25, 1985, and July 26, 1985, is to be offered and received by the Court as evidence at the trial on the merits. No additional testimony or evidence was presented by any party to this cause of action. The Plaintiffs waived their claim for monetary damages and amended their pleadings pursuant to Plaintiffs' Request for Trial Amendment filed at the time of this trial. The Court after having examined all pleadings and documents and heard the evidence and arguments of Counsel finds that Plaintiffs and Intervenors are not entitled to the relief sought and that Defendants are entitled to judgment. The Court further finds that Plaintiffs' suit is not frivolous. The Court therefore concludes that the following judgment should be entered.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by this Court that Plaintiffs, CITIZENS FOR BETTER EDUCATION, a Texas non-profit corporation; and, EDWIN & ANNIE GONZALEZ, individually and as next friend of SANDY GONZALEZ, a minor child; DAN & VICKI PINSON; RICHARD & DIANA DIETRICH; MIRTA BENAVIDES, individually and as next friend of CHRIS BENAVIDES, a minor child; MARY BUIE; CAROLYN CHASE, individually and as next friend of ED & WALLACE CHASE, minor children; RENA CHANEY; MIKE & LINDA SHIRLEY; TOM OLIVER; JIM & BONNIE HARDY; CAROLYN HINCHLIFFE; MADALYN ALBUS, individually and as next friend of MATTHEW ALBUS, a minor child; JUDY GALLENDER, individually and as next friend of MELISSA GALLENDER; BRIDGET GERZA; MARY HUTCHINSON; GEORGIA RUTH VOSLOH; and, JEANNINE JOHNSON take nothing from Defendants, GOOSE CREEK CONSOLIDATED INDEPENDENT

SCHOOL DISTRICT and THE BOARD OF TRUSTEES OF THE GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, and that all relief sought by Plaintiffs, CITIZENS FOR BETTER EDUCATION, a Texas non-profit corporation; and, EDWIN & ANNIE GONZALEZ, individually and as next friend of SANDY GONZALEZ, a minor child; DAN & VICKI PINSON; RICHARD & DIANA DIETRICH; MIRTA BENAVIDES, individually and as next friend of CHRIS BENAVIDES, a minor child; MARY BUIE; CAROLYN CHASE, individually and as next friend of ED & WALLACE CHASE, minor children; RENA CHANEY; MIKE & LINDA SHIRLEY; TOM OLIVER; JIM & BONNIE HARDY; CAROLYN HINCHLIFFE; MADALYN ALBUS, individually and as next friend of MATTHEW ALBUS, a minor child; JUDY GALLENDER, individually and as next friend of MELISSA GALLENDER; BRIDGET GERZA; MARY HUTCHINSON; GEORGIA RUTH VOSLOH; and, JEANNINE JOHNSON be and is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Intervenors' claim for relief is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiffs' request for attorney's fees is hereby denied and Defendants' counterclaim and request for attorney's fees is hereby denied.

All costs of court expended or incurred in this cause are hereby adjudged against Plaintiffs.

This is a final judgment.

SIGNED this 9th day of August, 1985.

/s/ MICHAEL L. O'BRIEN
Judge Presiding

APPROVED AS TO FORM:

REID, STRICKLAND & GILLETTE
No. 99999983

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## APPENDIX F

FINDINGS OF FACT AND CONCLUSIONS OF LAW, SIGNED: September 16, 1985. ENTERED: Volume 3124, Page 06, General Minutes, District Courts, in and for Harris County, Texas.

No. 85-32372

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
127th JUDICIAL DISTRICT

CITIZENS FOR BETTER EDUCATION,
a Texas non-profit corporation

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, and THE BOARD OF TRUSTEES OF THE GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT

### I

### FINDINGS OF FACT

1. The Goose Creek Consolidated Independent School District (GCCISD) is a political subdivision of the State of Texas which operates the public schools located in an area in eastern Harris County and western Chambers County.

2. The Goose Creek Consolidated Independent School District is a body politic governed by a seven-member Board of Trustees and operated pursuant to the education laws and general laws of the State of Texas.

3. The Plaintiff, Citizens for Better Education, is a citizens' group. The other Plaintiffs are certain named individuals who are parents of some of the students to be affected by the implementation of a rezoning plan adopted by the GCCISD Board of Trustees on February 11, 1985.

4. An intervention has been filed by a group of parents who reside within the GCCISD.

5. The GCCISD has two senior high schools, Robert E. Lee and Ross S. Sterling.

6. The enrollment, by race and ethnicity, of the two high schools during the 1984-1985 school year was as follows:

| | Lee High School | Sterling High School |
|---|---|---|
| Anglo | 1,117 (55.2) | 1,846 (76.1) |
| Hispanic | 601 (29.7) | 200 ( 8.3) |
| Black | 304 (15.1) | 379 (15.6) |
| Total: | 2,022 | 2,425 |

7. Prompted by community concerns expressed over several years and by a recognition that demographic changes were altering, and in the future would more significantly affect the racial and ethnic composition of the two high schools, the GCCISD Board of Trustees began to study possible alternatives for preventing ethnic and socio-economic isolation between the schools.

8. The GCCISD Board of Trustees had the administration prepare studies, and the Board considered several alternatives such as a feeder system, magnet schools, pairing, lottery, and various rezoning proposals.

9. The Board of Trustees conducted two public hearings on these issues. The Board also heard from citizens on this issue at other meetings.

10. The Board adopted a rezoning plan calling for the redrawing of attendance zones for Lee and Sterling High Schools at a duly called and posted meeting of the Board of Trustees on February 11, 1985.

11. Under the rezoning plan, the northern boundary of the Robert E. Lee attendance zone was moved further north (because it is the same boundary line, the southern boundary of Ross S. Sterling was, of course, also shifted to the north). Also, under the plan, several attendance areas which were in the Lee zone (No. 10, 11, and 12) became a part of the Sterling Zone. The high school bilingual program was placed at Ross S. Sterling. Other than bilingual students, the rezoning plan is only applicable to students entering high school after the 1984-1985 school year. A sibling rule is included in the plan.

12. The Board's principal motivation in redrawing the attendance zones was an effort to more evenly distribute the ethnic compositions of Lee and Sterling High Schools.

13. While ethnic balance was a principal factor in the Board's decision, it was not the only factor. The Board was also concerned with socioeconomic factors, test scores, and course offerings.

14. The GCCISD is not presently under any judicial desegregation order or administrative directive concerning desegregation except as exists under the general statewide decree issued in C.A. 5281, *United States v. Texas.*

15. After this suit was filed one of the affected parents who was opposed to the Board's adoption of the plan sought an administrative hearing to contest the action of the Board. The Board refused to grant a hearing upon advice of legal counsel stating that Sections 21.074 and 21.075 of the Texas Education Code did not apply to the redrawing of school attendance zones.

16. The action of the Board of Trustees taken on February 11, 1985, constitutes a redrawing of school attendance zones and does not constitute the transfer of students.

17. In adopting the rezoning plan, the Board of Trustees of the GCCISD utilized its discretion and judgment.

18. The GCCISD Board of Trustees, at all relevant times, acted within the scope of their discretionary powers, acted in good faith, and acted without any discriminatory purpose.

## II.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter.

2. The GCCISD is a unitary school district.

3. The GCCISD Board of Trustees has the power to voluntarily initiate and implement a student assignment plan based on the race or ethnicity of the students in order to remedy racial or ethnic imbalance brought about solely by demographic changes within the District.

4. Section 23.26 of the Texas Education Code vests in the Board of Trustees of the GCCISD the exclusive power to manage and govern the schools of the district. The rezoning plan adopted by the Board was within its statutory grant of power and authority.

5. The rezoning plan adopted by the GCCISD Board of Trustees is within the federal and state constitutional authority of the Board.

6. Sections 21.074 and 21.075 do not apply to the facts of this case.

7. If Sections 21.074 and 21.075 of the Texas Education Code do apply, these sections are unconstitutional to the extent they forbid the use of race-conscious remedial efforts to achieve or maintain racial integration.

8. The Plaintiffs' request for permanent injunction to enjoin the implementation of the rezoning plan adopted by GCCISD is DENIED.

9. This suit is not frivolous or unfounded so as to justify the award of attorneys' fees in favor of GCCISD and against Plaintiffs.

10. The costs of this suit are taxed against the Plaintiffs.

11. Any finding of fact which is properly a conclusion of law is hereby deemed to be such.

SIGNED this 16th day of September, 1985.

/s/ MICHAEL L. O'BRIEN
Michael L. O'Brien
Judge, 125th District Court
Harris County, Texas

## APPENDIX G

No. 85-32372

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
125TH JUDICIAL DISTRICT

CITIZENS FOR BETTER EDUCATION,
a Texas non-profit corporation, et al.,
Plaintiffs

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, and THE BOARD OF TRUSTEES OF THE GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
Defendants

### ORDER

The Court, having considered Plaintiff's request for trial amendment with regard to Plaintiff's Jurisdictional allegations finds the request meritorious and the granting of Plaintiffs' trial amendment would not operate to Defendants' surprise or prejudice.

It is therefore ORDERED that Plaintiff's First Amended Petition be and it is hereby, further amended to include a specific allegation of jurisdiction based on the Fourteenth Amendment to the United States Constitution.

SIGNED this 8th day of August, 1985.

/s/ MICHAEL L. O'BRIEN
Judge Presiding

## APPENDIX H

No. 85-32372

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
125th JUDICIAL DISTRICT

CITIZENS FOR BETTER EDUCATION, a Texas non-profit corporation; and, EDWIN & ANNIE GONZALEZ, individually and as next friend of SANDY GONZALEZ, a minor child; DAN & VICKI PINSON; RICHARD & DIANA DIETRICH; MIRTA BENAVIDES, individually and as next friend of CHRIS BENAVIDES, a minor child; MARY BUIE; CAROLYN CHASE, individually and as next friend of ED & WALLACE CHASE, minor children; RENA CHANEY; MIKE & LINDA SHIRLEY; TOM OLIVER; JIM & BONNIE HARDY; CAROLYN HINCHLIFFE; MADALYN ALBUS, individually and as next friend of MATTHEW ALBUS, a minor child; JUDY GALLENDER, individually and as next friend of MELISSA GALLENDER; BRIDGET GERZA; MARY HUTCHINSON; GEORGIA RUTH VOSLOH; and, JEANNINE JOHNSON,
Plaintiffs

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT; and, THE BOARD OF TRUSTEES OF THE GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
Defendants

MEMORANDUM OF OPINION

### I.

### INTRODUCTION

After a hearing on Plaintiffs request for a Temporary Injunction, this Court is now faced with the difficult

legal issue concerning the power of a local school board to voluntarily initiate a plan for the redrawing of pupil attendance zones and the busing of students to correct a perceived racial imbalance.

The Plaintiffs are a citizens group entitled Citizens for a Better Education, and the certain named individuals who are parents of some of the students to be effected by the implementation of the school board's plan.[1] (hereinafter referred to collectively as "Plaintiffs"). The defendants are the Goose Creek Independent School District (GCISD) and the Board of Trustees of said district. (hereinafter referred to as "school board"). An intervention has also been filed by a group of parents who reside in the district. However, their position is closely aligned with the position taken by the school board in this case.

Plaintiffs seek a temporary injunction to prevent the school board from implementing a plan designed to change the racial composition of Robert E. Lee (Lee) and Ross Sterling (Sterling) High Schools of Baytown, Texas. Plaintiff's petition alleges that the primary factor considered by the school board in adopting this rezoning plan was its desire to achieve a more even balance in the racial or ethnic ratio in the two schools, and that the use of race as a principal factor in their decision is constitutionally impermissible. Specifically, Plaintiffs contend that the school board has exceeded its power to implement educational policy when it undertakes a plan of desegregation, where race is a factor in implementing the

1. Initially, the defendants argued that the original Plaintiff, Citizens for Better Education, lacked standing to bring this suit. By agreement of counsel, the individual Plaintiffs were added by Trial Amendment thereby obviating the question of standing.

plan, without a prior judicial or quasi-judicial administrative finding of current, racially segregative policies or conduct. Moreover, Plaintiffs assert that the use of race as a factor to promote racial balance is violative of Sections 21.074 and 21.075 of the Texas Education Code, as well as being violative of their rights under the Fourteenth Amendment to the United States Constitution.[2]

Before proceeding to an alalysis of Plaintiffs allegations under applicable state and federal law, it is helpful to briefly review the facts, largely undisputed, giving rise to this litigation.

## II.

## FACTUAL BACKGROUND

Lee and Sterling are the two senior high schools in Baytown, Texas governed by the GCISD school board. The current racial composition of the two schools is as follows:

| | Total Students Lee (2022) | Total Students Sterling (2425) |
|---|---|---|
| White | 55.2% | 76.1% |
| Mexican-American | 29.7% | 8.3% |
| Black | 15.1% | 15.6% |
| Total | 100% | 100% |

The school district is not presently under any continuing judicial desegregation order or administrative agency di-

2. In their First Amended Petition Plaintiffs do not specifically mention a violation of the Fourteenth Amendment, although in briefing and argument before the Court the issue has been raised.

rective, except as exists under the general, umbrella order of *United States v. Texas*. Under the yearly review performed by the Texas Education Agency to insure compliance with that decision, GCISD has been found in complinance with all applicable civil rights provisions.

Prompted by the complaints of approximately 265 parents in the district in August, 1984, as evidenced by a post-card petition[3], and by a recognition that demographic changes (chiefly the influx of Mexican-Americans in the Lee school zone) were altering, and in the future would more significantly affect, the racial composition of the two schools, the Board began to consider alternate plans for alleviating the perceived effects of demographic change. Studies were commissioned by the Board, and several alternatives, such as a feeder system, magnet school program etc. were considered. The Board conducted public hearings on two occassions. In a regularly scheduled meeting of the board on February 11, 1985, the Trustees adopted a plan calling for the redrawing of school attendance zones for selected pockets within the district.

Under this "pocket-zoning" plan, students from several predominantly Mexican-American neighborhoods, in close proximity to Lee High School (zones 10, 11 & 12) would be bused to their new school at Sterling. Oother pockets of white students were rezoned from Sterling to Lee. (zones 3, 6 & 7). *See Plaintiff Exhibit No. 9*. As is

3. The post cards contained the following message:
"Dear School Board Members:
We, as taxpayers of GCISD are concerned about R. E. Lee, and ask that your *immediate* attention be given to correcting the ethnic imbalance that exists between our two high schools.

Signature

clear from the plan adopted, the Board's principal motivation in redrawing the attendance zones was an effort to more evenly adjust and distribute the ethnic or racial composition of Lee and Sterling. While race was a principal factor it was not the only factor. The board was apparently concerned about lower test scores and the lesser number of college bound students at Lee.

Several of the affected parents who were opposed to the board's adoption of the plan sought an administrative hearing to voice their objections to the plan. After efforts to obtain such a hearing failed, this suit was instituted.

## III.

## ISSUES PRESENTED

As the factual scenario unfolds, the narrow legal issue raised may be framed as follows:

> Does a local school board have the power, after a unitary system has been achieved, to voluntarily initiate and implement a plan of integration, based on the race or ethnic origin of the students to be affected, in order to correct a racial imbalence brought about solely by demographic change?

Plaintiffs answer in the negative, citing a long line of federal cases limiting the power of a district court to act after officially sponsored racial segregation has been eliminated. Plaintiffs further cite *Bakke* for the proposition that race may not be used as a factor in implementing this plan. In supplemental briefs submitted to this Court following the hearing, Plaintiffs appear to place considerable reliance on the language of Section 71.025

of the Texas Education Code as a limitation on the power of the school board to act in this case.

On the other hand, defendants argue that the power of the school board to determine educational policy is plenary absent constitutional violation, and that the use of race as a factor is achieving intergration is constitutionally permissible.

This Court will first separately analyze the important federal constitutional issues, and then address Plaintiffs claim that the plan violates the cited statutory provisions of the Texas Education Code.

## IV.

## FEDERAL LAW

A. *The duty of local school authorities to desegregate.*

With the advent of the landmark decision of United States Supreme Court in *Brown v. Board of Education,* 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954), overruling the doctrine of "separate but equal", and mandating that the dual system of racially segregated schools be dismantled, the Courts were then faced with the more complex question of the proper constitutional remedy to be applied to correct this unconstitutional wrong. As might be expected, the Mandate of *Brown* was not met with cordial compliance. Many years later, the scope of judicially created relief available to remedy this violation of the Fourteenth Amendment was decided in the now oft-cited decision of *Swann v. Charlott-Mecklenburg Board of Education,* 402 U.S. 1, 91 S. Ct. 1267, 28 L.Ed.2d 554 (1971). The Supreme Court in *Swann* made it clear that judicial authority was being invoked because

the school authorities had defaulted in their constitutional obligations. *Swann,* 402 U.S. at 16.

The precise import of *Swann,* and its progeny teach us that school authorities have an affirmative duty to eliminate all vestiges of segregation "root and branch", and that this duty exists until the dual system has been supplanted with a unitary system. *Swann v. Charlotte-Mecklenburg Board of Education,* supra; *Green v. County School Board,* 391 U.S. 430, 437-38, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968), *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 538, 99 S. Ct. 2971, 61 L.Ed. 2d 720 (1979).

In *Swann,* the Supreme Court, however, did recognize a limit to the broad powers granted the courts to fashion a remedy for racial segregation when the Court stated:

> "It does not follow that the community served by a (unitary) system will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished, and racial discrimination through official action is eliminated from the system.

*Swann,* 402 U.S. at 31-32.

Several years later this reasoning was applied to prevent a federal district court from imposing a plan requiring the Pasadena (Calif.) School District to rearrange its attendance zones each year so as to ensure a racial mix desired by the district court. *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 436, 96 S. Ct. 2697, 49 L.Ed.2d 599 (1976). Once a racially neutral

plan eliminating state imposed segregation has been implemented and achieved, the district court has

> ". . . fully performed its function of providing the appropriate remedy for previously racially discriminatory attendance patterns, and the district court no longer has supervisory power over the school district."

*Pasadena City Board of Education v. Spangler,* 427 U.S. at 437. The *Spangler* decision is now widely cited for the proposition that under federal law school boards are under no duty to correct de facto segregation resulting from demographic changes in a school district, and that there is no constitutional requirement that schools adhere to a particular racial composition. *Los Angeles Branch NAACP v. L.A. Unified School District,* 750 F.2d 731 (9th Cir. 1984). See *Morgan v. McKeigue,* 726 F.2d 33 (1st Cir. 1984); *Parents Association of Andrew Jackson High School v. Ambach,* 590 F.2d 705 (2nd Cir.), *cert. denied,* 440 U.S. 985 (1979); *Whittenberg v. School Dist. of Greenville County,* 607 F. Supp. 289 (D.C. S.C. 1985).[4]

Apparently based on the statute of federal law as discussed above, Plaintiffs argue that the school board, like a federal district court, is beyond its jurisdiction to implement further desegregation once a unitary system is achieved, unless there is proof or a finding of an extant

---

4. Of course, even if a unitary system is achieved a district court may still remedy subsequent constitutional violations, but in such cases, it must be shown that the school district acted with the intent of discriminating on the basis of race, and that it did in fact so discriminate. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420, 97 S. Ct. 2766, 53 L.Ed.2d 851 (1977).

constitutional violation resulting from the school system's intentionally discriminatory acts.

Under the record in this case, it can not be argued, and must be conceded, that the Goose Creek Independent School District is a unitary system. The evidence further demonstrates that Lee and Sterling are not in any significant way different in the quality of the educational opportunity, facilities, staffs or activities offered to their respective students. Simply stated, there is no evidence of any officially sponsored segregation in the school district nor is there evidence of any past invidious discrimination which needs to be corrected. Under this factual setting, it might be confidently opined that a district court *would not* be entitled to rearrange attendance zones to reach a more palatable racial mix if opposed by the school district. See *Morgan v. McKeigue, supra* (vacating district court order and directing district court to explain how its order is necessary and appropriate to achieve desegregation goals not yet fulfilled); *Parents Association of Andrew Jackson High School v. Ambach, supra* (reversing district court order for ordering racial balance without finding intentional segregation); *Whittenberg v. School District of Greenville County, supra* (unitary system achieved; complaint of racial imbalance dismissed). But to read these federal decisions as placing a limitation on the power of a school board to implement educational policy, as plaintiffs would have this Court do, is to misinterpret the relevant constitutional and public policy considerations underlying those decisions.

The duty of local school authorities to fulfill and maintain the mandate of a racially neutral school system is not only coextensive, but is even greater in scope than that of the district courts, who historically have been

called upon to redress inequities resulting from the school authorities failure to act. As explained by the Supreme Court in *Milliken v. Bradley,* 433 U.S. 267, 281, 79 S. Ct. 2749, 53 L.Ed.2d 745 (1977), "(S)chool authorities have the primary responsibility for elucidating, assessing, and solving these problems . . ." Again, the Supreme Court's words in *Swann* provide the suitable framework for analyzing Plaintiffs arguments:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negroes to white students reflecting the proportion of for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities;* absent a finding of a constitutional violation, however, that would not be within the authority of a federal court."

*Swann,* 402 U.S. at 16 (emphasis added).

Thus, school boards derive the power to act from their constitutional obligations, not from the impetus of court order or administrative finding. School boards are likewise empowered to exceed the minimally, prescribed constitutional standards in promoting the values of an integrated school. *Swann v. Charlotte-Mechlenburg Board of Education, supra; Martin v. Charlotte Mecklenburg Board of Education,* 475 F. Supp. 1318 (W.D. N.C. 1979), *aff'd,* 626 F.2d 1165 (4th Cir. 1988), *cert. denied,* 450 U.S. 1041 (1981).

Having to necessarily concede that the school board has the power to voluntarily implement a plan of integration

without prior court order or administrative finding, Plaintiffs nonetheless argue that the race-conscious remedy selected by the school board violates the Constitution. This contention will be examined in light of the Supreme Court's opinions in *Bakke* and *Fullilove.*

B. *Constitutionality of the Proposed Plan Based on Racial Factor.*

The Supreme Court of the United States has ruled on the contention that a governmental remedial program considering race as a factor violates the Equal Protection Clause of the Fourteenth Amendment in only two cases. The first and most notable is *Regents of the University of California v. Bakke,* 438 U.S. 265, 98 S. Ct. 2733, 57 L.Ed.2d 750 (1978). The Court concluded that a University's preferential admissions program for minority student applicants violated Title VI of the 1964 Civil Rights Act, which a majority of the Court viewed as coextensive with the Equal Protection Clause. But the Court also held that the University should not be enjoined from considering the race of the applicant in its admission process. In the second case, *Fullilove v. Klutznik,* 448 U.S. 448, 100 S. Ct. 2758, 65 L.Ed.2d 902 (1980), the Court found that a federal statute requiring that at least ten percent (10%) of federal funds granted for local public works projects be set aside for purchases from minority-owned businesses did not violate the Equal Protection Clause.

In each of these decisions, the Court was sharply divided, and lower courts may be operating in largely uncharted waters when determining the constitutionality of race-conscious remedial programs. But fortunately, this Court does not write on a clean slate in deciding the

issues in the instant case. In *Kromnick v. School District of Philadelphia,* 739 F.2d 894 (3d Cir. 1984), *cert. denied,* 105 S. Ct. 782 (1985) the Court addressed the very legal issues to be resolved herein.

In *Kromnick,* a class action was brought to enjoin the school district from enforcing its policy under which teachers were transferred to other schools in the district in order to maintain racial integration of the faculty in each school. The school district sought to maintain a faculty ratio at each school of between 75 and 125 percent of the system-wide proportions of white and black teachers so that the racial composition of each school's faculty reflected that of the overall teaching staff. If by reason of open positions, a school would fall outside this 75/125 precent range, teachers of the overrepresented race were transferred even though they may have had more seniority. As in this case, the issue involved the school's voluntary adherence to the plan.

The district court in *Kromnick* found that the maintenance of the transfer policy after faculty integration has been achieved violates the Equal Protection Clause and Title VII of the Civil Rights Act.

The district court noted that the policy's current purpose "is not to remedy past discriminations . . . , but to guard against the possibility that the system will revert to its pre-1978 level of racial imbalance in faculty assignments." *Kromnick v. School District of Philadelphia,* 555 F. Supp. 249, 252 (E.D. Penn. 1983). The Court held that the school district had failed to show that the policy was substantially related to achievement of the legitimate and important objective of enhancing educational opportunities for school children, because it had

not demonstrated "through empirical evidence" the likelihood of reversion to prior levels of segregation. Further, the Court held that the school district had failed to demonstrate the unavailability of "nondiscriminatory alternatives". *Kromnick, supra* at 254.

If the federal district court opinion in *Kromnick* was the law of the land Plaintiffs constitutional arguments would hold water. But on appeal to the Third Circuit Court of Appeals, the district court was reversed. *Kromnick v. School Dist. of Philadelphia,* 739 F.2d 894, (3d Cir. 1984) *cert. denied,* 105 S. Ct. 782 (1985).

The appellate court first distinguished *Bakke* from the policy used by the Philadelphia School District, much like the Court did in *Martin.* In each of these cases, the plans did not prevent a student from attending school on the basis of race (*Martin*) or result in a teacher being laid off or promoted on the basis of race (*Kromnick*). Applying either the intermediate or the more rigorous standard for the constitutional review of the racial classifications,[5] the Court concluded that the Equal Protection Clause does not forbid race-conscious remedial action.

Of particular significance to this case, is language employed by the Court when referring to the power of local school boards.

> "Patently, a school district is competent to choose a race-conscious teacher assignment policy to further

5. Under the intermediate standard of review, the question is whether the classification serves important governmental objectives and is substantially related to achievement of those objectives. *Bakke,* 438 U.S. at 359. Under the rigorous standards three factors, among others, are considered: (1) the importance and validity of the remedial aim, (2) the competence of the agency to choose such a remedy, and (3) the tailoring of the remedy so as to limit the burden suffered by others. *Kromnick,* 739 F.2d at 904.

> educational goals. Although Justice Powell in *Bakke* reasoned that the University of California lacked competence to discern and remedy *societal* discrimination that might have affected the stream of would-be doctors, 438 U.S. at 307-09, 98 S. Ct. at 2757, we do not read that opinion as in derogation of the Supreme Court opinions containing broad language affirming the special competence of school districts to adopt race conscious remedies.

*Kromnick*, 739 F.2d at 906-907.

This Court is mindful that the proposed plan in this case will have the effect of displacing some children from the schools of their local neighborhood.[6] Yet, it is equally clear that the use of rezoning to achieve racial balancing is an appropriate tool to be used by a school board to prevent recurring segregation.

It may well be that if this Court were given the opportunity to make the educational policy decisions in this case, the Court would opt for a less drastic measure than used here, and allocate the money to be used for the purchase of buses to a more direct benefit such as additional staffs, enrichment programs for college bound and the like. But the board of trustees, not this court, is given the exclusive authority to operate the school districts by law. This Court can not impose its judgment and authority for that of local school authorities, unless their actions

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6. The argument for the neighborhood school concept is not without its support in law. The Supreme Court has recognized that in a system that has not been deliberately constructed and maintained to enforce racial segregation "it might well be desirable to assign pupils to schools nearest their homes." *Swann*, 402 U.S. at 28. Congress has enacted legislature recognizing the desirability of neighborhood schools, 20 U.S.C. Sec. 1701, (Sec. 1701(a)(2) the neighborhood is the appropriate basis for determining public school assignments); and the Texas Legislature has recently done likewise.

violate a constitutionally guaranteed right. *Bradford v. School District No. 20,* 244 F. Supp. 768 (D.S.C. 1965), *aff'd,* 364 F.2d 185 (4th Cir. 1966); *Wharton v. Abbeville School District No. 60,* 608 F. Supp. 70 (D.C.S.C. 1984). The right to attend a neighborhood school is not a constitutionally guaranteed right which would operate to void the judgment and authority of a local school board. *Wharton v. Abbeville School District No. 60, supra.* This Court concludes that the "pocket rezoning" plan, as approved by the school board, is within the constitutional authority of the school board to implement in furtherance of its constitutional obligation to maintain a desegregated school system.

## V.

## STATE LAW

## TEXAS EDUCATION CODE

Plaintiffs contend the board's proposed plan violates Sections 21.074 and 21.075 of the Texas Education code. Section 21.074 gives a board of trustees of any school district the authority to transfer and assign any pupil or group of pupils from one school facility or classroom to another within its jurisdiction. Section 21.075(a) allows the board to consider sixteen (16) enumerated factors in making this determination. Section 21.075(b) specifically prohibits the consideration of national ethnic origin of the pupil or the pupil's ancestral language as a basis for this determination.

This Court will not dodge the legal bullet by holding that Sections 21.074 and 21.075 did not apply to the facts of this case. To do so in this case would be to pay homage to form over substance.

However, assuming arguendo that the statute applies, it violates the broad mandate given school boards to achieve integration. The Supreme Court has several times held unconstitutional measures that would have limited a school system's power to choose race-conscious remedies. See *Washington v. Seattle School District No. 1*, 459 U.S. 457, 102 S. Ct. 3187, 73 L.Ed.2d 896 (1982) (initiative prohibiting school district's use of busing); *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45, 91 S. Ct. 1248, 28 L.Ed.2d 586 (1971) (*Swann II*) (law forbidding race-conscious busing is infringement on school authorities' "wide discretion" to formulate policy to achieve racial balance). The Court has consistently supported a school system's affirmative duty and discretion to take steps to remedy racial imbalance, a view that perforce applies to a policy of student integration. To the extent state law conflicts with federal law it is superseded.

The words of the Federal district court in *Martin, supra* are as appropriate epilogue to this opinion:

> "The culture and attitudes and results of three centuries of segregations can not be eliminated or corrected in ten years. Human nature and practices don't change fast, even in the hands of people of good will like the members of the present School Board. They need time to work their own experiments and to find their own ways of producing the sustained operation of a system of schools in which racial discrimination will play no part. I vote to uphold their efforts to date, and to give them that time.

*Martin*, 475 F. Supp. at 1347.

This Court will likewise recognize the power and authority vested in the school board to effectuate educa-

tional policy, and will not interfere with their exercise of that judgment.

## VI.

## CONCLUSION

Based on the foregoing, Plaintiffs' request for a temporary injunction to prevent or enjoin the implementation of the pocket zoning plan is DENIED.

This case will be preferentially set for trial within thirty (30) days from the date of this opinion, unless a continuance is requested by counsel for further discovery.

SIGNED this 1st day of August, 1985.

/s/ MICHAEL L. O'BRIEN
Michael L. O'Brien
Judge, 125th District Court

# APPENDIX I

## U. S. CONSTITUTION

## AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property. without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## APPENDIX J

NO. C-6032

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IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

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CITIZENS FOR BETTER EDUCATION,
A TEXAS NON PROFIT CORPORATION, et al.,
Appellants

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT AND THE BOARD OF TRUSTEES OF GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
Appellees

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(Filed June 22, 1987)

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NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

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Notice is hereby given that Citizens for Better Education, a Texas Non-Profit Corporation; Edwin & Annie Gonzalez, Individually and as Next Friend of Sandy Gonzalez; Dan & Vicki Pinson; Richard & Diana Dietrich; Mirta Benavides, Individually and as Next Friend of Chris Benavides; Mary Buie; Carolyn Chase, Individually and as Next Friend of Ed & Wallace Chase; Rena Chaney; Mike & Linda Shirley; Tom Oliver; Jim & Bonnie Hardy; Carolyn Hinchliffe; Madalyn Albus, Individually and as

Next Friend of Matthew Albus; Judy Gallender, Individually and as Next Friend of Melissa Gallender; Bridget Gerza; Mary Hutchinson; Georgia Ruth Vosloh; and Jeannine Johnson, as Appellants, hereby appeal to the Supreme Court of the United States from the final order of the Texas Supreme Court refusing Appellants' Application for Writ of Error to the Court of Appeals for the First Supreme Judicial District with the notation no reversible error, entered on March 25, 1987.

This appeal is taken pursuant to Title 28 USC § 1257(2).

Respectfully submitted,

/s/ GEORGE M. KIRK, JR.
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PROOF OF SERVICE—
CERTIFICATE BY BAR MEMBER

I, George M. Kirk, Jr., attorney for the Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of June, 1987, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

A. On the Goose Greek Consolidated Independent School District and the Board of Trustees of the Goose Creek Consolidated Independent School District by mailing copies in a duly addressed envelope, with first class

postage prepaid, certified mail, to their attorneys of record, as follows:

1. Mr. Richard A. Peebles
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B. On Pamela K. Sutton, James M. Cauley, Robert J. Kalbitz, William Keith Lawhon and wife, Donna M. Lawhon, Rolland J. Pruett and wife, Joan K. Pruett, William L. Hinkle, Robert R. Buntin, Kenneth L. Tilton and wife, Gayle Tilton, Jimmy Epperson, Bobby Thompson and wife, Gwendolyn Thompson and Percy Wilburn Vail and wife, Margaret Ann Vail by mailing copies in a duly addressed envelope, with first class postage prepaid, certified mail to their attorney of record, as follows:

1. Mr. Andrew Lannie
3814 Highway 146
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C. On the Court of Appeals for the First Supreme Judicial District, 1307 San Jacinto, 10th Floor, Houston, Texas 77002, by personal delivery to the Clerk of said Court for filing.

/s/ GEORGE M. KIRK, JR.
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Supreme Court, U.S.
FILED
JUL 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-2061

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

CITIZENS FOR BETTER EDUCATION,
A TEXAS NON-PROFIT CORPORATION, et al.,
*Appellants*

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT
SCHOOL DISTRICT AND THE BOARD OF
TRUSTEES OF GOOSE CREEK CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT,
*Appellees*

**ON APPEAL FROM THE
SUPREME COURT OF TEXAS**

## MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

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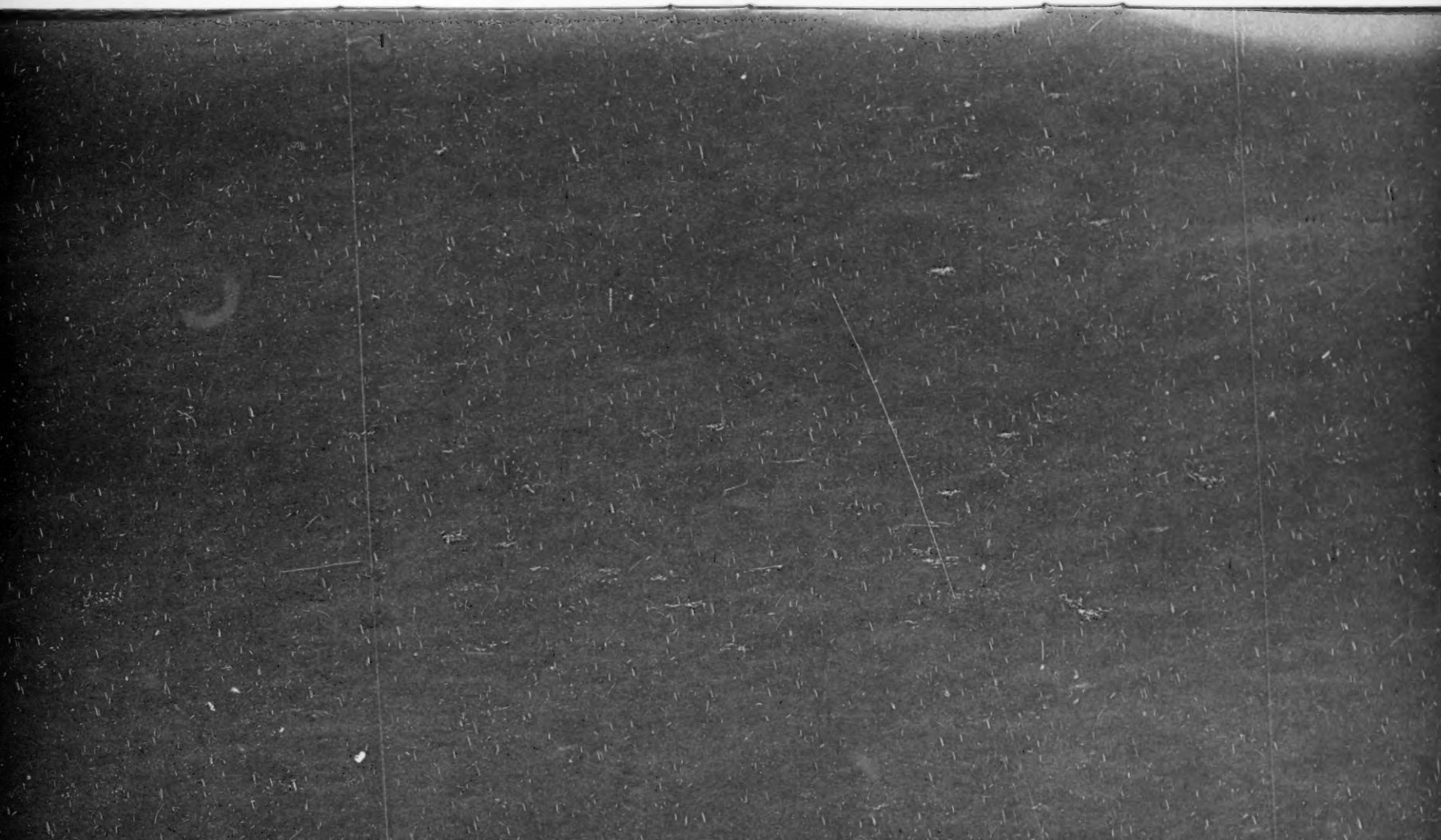

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NO. 86-2061

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

CITIZENS FOR BETTER EDUCATION,
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*Appellants*

v.

GOOSE CREEK CONSOLIDATED INDEPENDENT
SCHOOL DISTRICT AND THE BOARD OF
TRUSTEES OF GOOSE CREEK CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT,
*Appellees*

**ON APPEAL FROM THE
SUPREME COURT OF TEXAS**

## MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

MAY IT PLEASE THE COURT:

Appellees, GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT and the BOARD OF TRUSTEES OF GOOSE CREEK CONSOLIDATED

INDEPENDENT SCHOOL DISTRICT (hereinafter "GCCISD"), Respondents in Cause No. C-6032 in the Supreme Court of Texas, Appellees in Cause No. 01-85-0837-CV in the Court of Appeals for the First Supreme Judicial District of Texas at Houston, Texas, and Defendants in Cause No. 85-32372 in the 125th Judicial District Court of Harris County, Texas, respectively submit this motion in the alternative to dismiss or to affirm in response to Appellants' jurisdictional statement which was filed for the Court's consideration on June 23, 1987, and move that the appeal taken herein be dismissed on the ground that said appeal does not present a substantial federal question.

## OPINIONS BELOW

This case involves the rezoning of school district attendance zones. This is an appeal from a decision of the Supreme Court of Texas which refused discretionary review of this case on March 25, 1987, and the opinion of the Court of Appeals for the First Supreme Judicial District of Texas entered August 28, 1986, rejecting Appellants' contention that a school board does not have the authority to implement a race-conscious rezoning plan in the absence of prior *de jure* or *de facto* segregation. The opinion of the Court of Appeals for the First Supreme Judicial District of Texas correctly states the nature and results of the suit and is contained in Appendix D of Appellants' jurisdictional statement. This Court of Appeals' decision was subsequently upheld by the Supreme Court of Texas which entered an order on March 25, 1987, refusing discretionary review of the Court of Appeals' decision and finding the decision contained no reversible error.

Appellees respectfully pray that the Court deny jurisdiction on appeal and uphold the decision of the Supreme Court of Texas entered on March 25, 1987.

## JURISDICTION

Appellants have not met the jurisdictional requisites to bring this appeal as contemplated by 28 U.S.C. § 1257 (2) in that Appellants failed to raise a substantial federal question.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are set forth in the Appellants' jurisdictional statement.

## STATEMENT OF THE CASE

The Appellants originally brought this action in the state District Court in Harris County, Texas, to enjoin the implementation of a rezoning of the school attendance areas of the Ross S. Sterling High School and the Robert E. Lee High School, the only two high schools within the GCCISD.

Throughout previous years, the GCCISD has had two high schools, Ross S. Sterling (hereinafter "Sterling") and Robert E. Lee (hereinafter "Lee"), which were similar in size, achievement and test scores, socioeconomic makeup, and ethnic and racial balance. In 1980, Sterling had 2,259 students and Lee had 2,190 students.

In the early 1980's however, there began to be a change in enrollment patterns, ethnic composition, test scores, numbers of students on free or reduced lunch, and numbers of college bound students. The projections

showed that Lee was going to remain about the same size with an increasing minority population, and Sterling was going to grow substantially with a relatively constant ethnic breakdown. These trends were of concern because of the possible future consequences in terms of building utilization, ethnic makeup, achievement and the possible elimination of college bound courses because too few students on a campus would request them.

The Board asked the administration to develop data concerning these various factors and possible ways to better balance the enrollment of the two schools. Over the 1984-1985 school year, many discussions were had and a great deal of study was done concerning this issue. Two public hearings were held concerning the matter, and the Board received input from citizens at other times.

The Appellants argued that the GCCISD reacted to the fact that a number of postcards were sent to the Board of Trustees regarding these problems during the summer of 1984. However, the testimony is clear that these problems were of concern to the Board for some time prior to that.

On February 11, 1985, the Board passed a motion to change the boundaries and attendance zones of Sterling and Lee High Schools, in what has come to be known as the "pocket zone" plan.

The plans were studied with the idea of minimizing cost and disruption. The plan chosen was the least disruptive in that it moved the fewest students and had the lowest transportation costs. It was the most efficient in terms of transportation. The plan was not seen as having any adverse effect on the educational offerings or program. The majority of those riding a bus to go to a different

school after implementation of the plan would have ridden a bus anyway.

All witnesses who discussed the issue agreed that the provision of an ethnically and racially integrated education is very important for students and their education. Even the President of the Appellants' association, Tom Oliver, agreed that the provision of an integrated education is a worthwhile goal. He simply disagreed with the Board's timing of its action. When questioned about the problem of possible ethnic imbalance in schools, Mr. Oliver could not say when he might choose to address the problem.

Appellants are correct that there has been no finding of *de jure* segregation within the GCCISD as it pertains to Hispanics and that the GCCISD is a unitary school district. However, it was precisely the concern over a trend toward *de facto* segregation of Hispanic pupils which was a prime motivator of the Board's action to rezone.

The Appellants presented several witnesses at trial who testified concerning their alleged objections to the plan. Much was made by these witnesses of their alleged inability to remain involved in their children's schooling. Supposedly, this rezoning now prevents them from attending their children's extracirricular activities. No real reasoning was given by these witnesses as to why such problems would occur. Nor did they say their children would be absolutely foreclosed from any participation. Lee High and Sterling High are 3.6 miles apart, and the driving time is 10 minutes. The only student who testified, Cobie Simpson, said that it did not matter which school she attended.

Mr. Curtis Herring of the GCCISD and Mr. Robert Howell of the Texas Education Agency (TEA), testified that the action taken by the Board was a rezoning of boundaries and not a transfer of students, and the trial court so found.

Two patrons of the GCCISD, Mr. Jere Johnson and Mr. Manuel Escontrias, testified that they supported the Board's action.

## ARGUMENT

## APPELLANTS DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

### I.

### THE COURTS BELOW CORRECTLY HELD AS A MATTER OF LAW THAT A SCHOOL BOARD HAS THE AUTHORITY TO IMPLEMENT A RACE-CONSCIOUS REZONING PLAN IN THE ABSENCE OF PRIOR *DE JURE* OR *DE FACTO* SEGREGATION.

The action of the Courts below in upholding GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT's rezoning plan and the action of the Texas Supreme Court in refusing discretionary review of this decision was proper and should be upheld. Appellants argue that a school board has no authority under state and federal law to implement a rezoning plan that considers race as a motivating force behind the plan unless such plan is pursuant to a Court Order where there has been a showing of prior *de jure* or *de facto* segregation. Appellants cite *Wygant v. Jackson Bd. of Educ.*, 476 U.S. ____, 106 S. Ct. 1842 (1986) as holding that a finding of prior discrimination is required

before use of racial classifications is allowed in order to remedy such discrimination. However, the absence of a court finding of segregation does not mean that a school board is prohibited from remedying perceived ethnic imbalances within the school district. As correctly pointed out by the Court of Appeals below, a school district is free to exceed the minimum requirements in order to promote school integration. *Citizens for Better Education v. Goose Creek Consolidated Independent School District,* 719 S.W.2d 350, 352 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). See *Fullilove v. Klutznick,* 448 U.S. 448, 508, 100 S. Ct. 2758, 2790 (1980).

Traditionally, locally elected school boards and their school administrators are afforded broad discretionary powers in formulating and implementing educational policy. It is unquestioned that the laws of the State of Texas permit local school boards to designate attendance zones for students. Ensuring that each and every student within the district receives the advantages that an integrated school system can provide is certainly within that broad discretionary authority. *Swann v. Charlotte - Mecklenburg Board of Education,* 402 U.S. 1, 16, 91 S. Ct. 1287, 1288-89 (1971); *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 45-46, 91 S. Ct. 1284, 1285-86 (1971).

A school district is required by the United States Constitution to provide an educational experience for all students regardless of such students' racial classifications. *Brown v. Board of Education,* 347 U.S. 483, 74 S. Ct. 686 (1954). Past court decisions have consistently supported school districts in their attempts to remedy any hint of racial imbalance within the schools. Appellees

contend that this rezoning plan was such an attempt at achieving constitutionally mandated integration within the GCCISD.

Appellants' reliance upon *Wygant* is misplaced for that case does not stand for the propositions which Appellants now urge before this Court. The cause of action in *Wygant* focused on a school board's attempt to implement an affirmative action program for its employees. That portion of the *Wygant* opinion to which Appellants refer speaks directly to affirmative action programs in employment, and such language cannot be so broadly interpreted as applying to school student rezoning plans. The Court in *Wygant* stated that ". . . a public employer like the Board must insure that, before it embarks on an *affirmative action program,* it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant,* 106 S. Ct. at 1848 [emphasis added]. The *Wygant* opinion states that evidence of prior discrimination is a prerequisite in taking the remedial steps of implementing an affirmative action plan to overcome such past discrimination in employment practices within a school system. The decision in *Wygant* does not state that a rezoning plan within a school district for student attendance is improper absent a showing of past discrimination. In fact, the *Wygant* court reaffirmed the position that public schools have a clear mandate to eliminate all racial segregation and discrimination in the schools. According to *Wygant,* in order to comply with such a directive, race-conscious remedial action may be necessary. *Wygant,* 106 S. Ct. at 1848, *citing North Carolina State Board of Education v. Swann,* 402 U.S. 43, 91 S. Ct. 1284 (1971).

A school board policy which seeks to achieve ethnically balanced student bodies and facilities within a school district certainly falls within this constitutional command of eliminating all possible racial discrimination and segregation within the schools. As stated, past court decisions have agreed that race may be considered in achieving such racial balance within a school system. *Swann,* 402 U.S. at 43; *McDaniel v. Barresi,* 402 U.S. 39, 91 S. Ct. 1287 (1971).

The *Wygant* case is more analogous to the case of *Regents of the University of California v. Bakke,* 438 U.S. 265, 98 S. Ct. 2733 (1978), than it is to the case now under consideration. In *Bakke,* it was stated that a classification which aids persons perceived as a minority race member at the expense of others is permissible only where there is evidence of past discrimination against such minority groups. *Bakke,* 438 U.S. at 307-308. Similarly, the affirmative action plan discussed in *Wygant* was intended to protect minority employees against lay offs.

Both *Bakke* and *Wygant* involve situations where different racial groups were competing for a limited number of places within a given field. In *Bakke,* the competition centered around enrollment within a medical school class while *Wygant* involved employment within a public school system. In both instances, individuals were being excluded or removed from the system provided by the public entity involved. The cases are distinguishable from the present case because no student is being excluded from the educational process, only directed as to which building within the system such student is to attend.

Appellees urge the Court to adopt the reasoning as stated in the Court of Appeals Opinion of August 28, 1986, where the Court held that, "We are not concerned here with the constitutionality of distributing a limited number of privileges on the basis of race, as was the case in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)." *Citizens for Better Education*, 719 S.W.2d at 352.

The *Wygant* case is distinguishable from the present case under consideration in that the broad language from *Wygant* relied upon by Appellants does not support their claim that Appellees' rezoning plan is unconstitutional. Therefore, Appellants' first contention is without merit.

## II.

## THE COURTS BELOW CORRECTLY HELD IN APPLYING A RATIONAL BASIS STANDARD OF REVIEW TO APPELLANTS' CLAIM THAT THE RACE-CONSCIOUS REZONING PLAN DID NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Next, Appellants argue that the Courts below employed the wrong standard of review in upholding Appellees' rezoning plan. Specifically, Appellants argue that *Wygant* requires that the rezoning action be measured by the "strict scrutiny" test rather than a "rational basis" standard.

While the Courts below did uphold Appellees' plan of rezoning under the rational basis standard of review, the Court of Appeals considered the plan according to the strict scrutiny test as well. The Court, citing *Brown*

*v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954), held that "If strict scrutiny were to apply, however, providing an integrated education has been described as perhaps the most important function of government and satisfies the requirement that the official action further a compelling state interest." *Citizens for Better Education*, 719 S.W.2d at 353. Thus, Appellees' rezoning plan is constitutionally permissible even if subjected to "strict scrutiny" analysis as now urged by Appellants. The Court of Appeals also correctly held that race was used in this case to promote integration and to extend benefits rather than deny them and therefore should only be subject to "rational basis" rather than "strict scrutiny" analysis. *Citizens for Better Education*, 719 S.W.2d at 352, *citing San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973).

Therefore, Appellants' contention that the Court of Appeals employed the incorrect standard of review in considering Appellees' rezoning plan is without merit.

## CONCLUSION

The contentions of Appellants that are raised in their jurisdictional statement fail to raise a substantial federal question. Appellees' motion to dismiss the appeal or in

the alternative to affirm the decision of the state court should be sustained.

Dated: July 17, 1987.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of July, 1987, a true and correct copy of the above and foregoing Motion in the Alternative to Dismiss or to Affirm has been forwarded via certified mail, return receipt requested, to the following attorneys of record to-wit:

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